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Recent Decisions

CONFLICT OF LAWS—Grouping of Contacts—When the original negligence occurs within its jurisdiction, the law of the forum may be applied though the injury occurs in a foreign state. *Myers v. Gaither* (D.C. Ct. App. 1967).

Appellant, a resident of Maryland, was driving on a Maryland highway when his car was struck in the rear by appellee's speeding automobile. Appellee, a resident of the District of Columbia, testified that he was not driving his car when the accident occurred and that he had not removed the keys from the car after parking it in the District of Columbia earlier that evening. The keys were found in the car's ignition at the scene of the accident, and it was presumed that the car had been stolen.[1] Failure to remove the ignition key from an unattended car was prima facie negligence in the District of Columbia and Maryland, but if Maryland law applied, appellee would not have been liable because the intervening theft had broken the chain of causation. If District of Columbia law was applicable, appellee would have been liable for damages because in that jurisdiction the theft would not be considered a break in the chain of causation. The trial judge directed a verdict in favor of appellee. The District of Columbia Court of Appeals, *held*, reversed with directions to grant a new trial. The District of Columbia had contacts with the issue which were superior to those of any other jurisdiction; therefore, the law of the District controlled. *Myers v. Gaither*, 232 A.2d 577 (D.C. Ct. App. 1967).

A conflict between the substantive law of the forum and that of the foreign state in which the injury occurred was traditionally resolved by the application of the law of the place of injury. The theoretical rationale for application of this rule of lex loci delicti has varied,[2] but its practical advantages have been consistently recognized. Lex loci delicti is a clearly defined standard which facilitates simple, consistent, predictable resolution of most tort conflict problems. Until recently uniformity of

1. The question whether the car was in fact stolen was not decided by the jury because the trial court directed the verdict for appellee. The appellate court as a result considered two alternative possible fact situations. Only one of the possible fact situations considered is relevant to this discussion, *i.e.*, that the car was stolen.

2. *Compare* Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1903) *with* Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

result was the primary consideration in this area of conflict law,[3] but for a generation authorities have criticized the inflexible lex loci rule and advocated a more equitable approach to the choice-of-law problems.[4] Not only does the lex loci rule produce inequitable results by ignoring the policy considerations which lie beneath the conflicting laws, but it impedes the development of better methods for resolving such problems by providing a mechanical rule which may be thoughtlessly applied.

Various alternatives to dogmatic application of the law of the place of the tort have been proposed.[5] The "grouping of contacts," "center of gravity," or "significant contacts" approach has been the most extensively considered alternative and has been accepted in several jurisdictions.[6] With the decision of *Babcock v. Jackson*[7] New York specifically rejected the lex loci delicti and adopted the grouping of contacts approach. The case was heralded as a milestone in the development of a new approach to choice-of-law problems involving conflict of tort laws.[8] The New York court described grouping of contacts as a process for selecting the applicable law by placing emphasis "upon the law of the place 'which has the most significant contacts with the matter in dispute.' "[9] Under the new rule the questions became: What are the contacts, and which contacts are significant rather than "merely fortuitous"?

The *Babcock* case dealt with a conflict between the laws of Ontario and New York with respect to the right of a guest in an automobile to recover against his host in the event of tortious operation of the automobile by the host. Ontario

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3. *See* Myers v. Gaither, 232 A.2d 577, 585-86 (D.C. Ct. App. 1967) (dissent); Cook, *The Logical and Legal Bases of the Conflict of Laws,* 33 YALE L.J. 457, 488 (1924); Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws,* 28 LAW & CONTEMPT. PROB. 795, 797 (1963).

4. *See* Babcock v. Jackson, 12 N.Y.2d 473, 478 n.4, 191 N.E.2d 279, 281 n.4, 240 N.Y.S.2d 743, 746-47 n.4 (1963).

5. Note, *The Grouping of Contacts—An Innovation in the Conflict of Laws,* 18 S.C.L. REV. 453, 456 n.13 (1966).

6. *See, e.g.,* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).

7. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

8. *See* Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212 (1963).

9. Babcock v. Jackson, 12 N.Y.2d 473, 479, 191 N.E.2d 279, 282, 240 N.Y.S.2d 743, 747 (1963).

would not have allowed the guest to recover because in that jurisdiction it was considered to be in the public interest to protect insurance companies from suits in which collusion between the insured party and the injured party was likely. New York law would permit the guest to sue since it recognizes no appreciable danger of a large number of collusive actions which would raise the insurance rates. Ontario's contact with the issue was situs of the injury. The New York contacts were that the guest and the host were residents of New York; the car was licensed, registered, and garaged in New York; the journey began and was intended to end in New York. In determining that its contacts with the issue were more significant, the court examined the policy basis for the Ontario law and concluded that Ontario's policy was not related to the issue presented. Ontario's interest lay in preventing collusive suits which would affect the general auto liability insurance rates in Ontario. A suit by a New York resident against a New York resident insured in New York could not affect the Ontario insurance rates, and therefore the Ontario contact was irrelevant.

The District of Columbia Court of Appeals in *Myers v. Gaither* abandoned the doctrine of lex loci delicti to which it had previously adhered[10] and adopted the grouping of contacts approach as implemented in *Babcock*. The court, in reviewing District of Columbia contacts, stated:

> The only contacts this case discloses which are purely Maryland are the domicile of the appellant and the location of the accident . . . contacts which are merely "fortuitous"; while the District's contacts are domicile of the appellee, the situs of the original or primary negligence, the chosen forum, and the overriding public interest in proscribing the conduct here alleged.[11]

In coming to the conclusion that the Maryland contacts were merely fortuitous, the court cited the Restatement (Second) of Conflict of Laws[12] and *Vanston Bondholders Protective Committee v. Green*[13] in support of the proposition that the purposes

10. *See, e.g.*, Miller & Long Co. v. Shaw, 204 A.2d 697 (D.C. Ct. App. 1964); Knight v. Handley Motor Co., 198 A.2d 747 (D.C. Ct. App. 1964).

11. Myers v. Gaither, 232 A.2d 577, 584 (D.C. Ct. App. 1967).

12. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).

13. 329 U.S. 156 (1946).

behind the tort rules should be considered in determining the relevance of contacts.

The District's rule, that the appellee should be liable for the acts of the thief by virtue of the fact that he negligently facilitated the theft by leaving the keys in his car,[14] was intended to discourage car theft in the District. By discouraging this practice the public would be protected from the high speed chases incident to automobile theft.[15] The District's interest in encouraging removal of keys from cars left unattended in the District was furthered by holding appellee liable for the accident. Maryland's rule which would not allow recovery in the same situation indicated that Maryland was not so concerned with car thefts as the District. Therefore, the car owner was protected when there was an intervening theft. Since the act occurred in the District of Columbia, its policy would have been thwarted if its law were not applied. However, the Maryland policy was not hindered by failure to apply Maryland's law because the owner who was held liable was not a resident of Maryland. This left Maryland with no interest in protecting him from the consequences of his act committed in the District of Columbia.

This was not the first consideration of the grouping of contacts by a District of Columbia court.[16] *Williams v. Rawlings Truck Line, Incorporated*[17] presented a problem theoretically though not factually analagous to *Myers* and *Babcock*. The court resolved the conflict without resort to grouping of contacts, even though the existence of the new rule was noted.[18] The case was held to present "a classic false conflicts situation" because application of the foreign law would not interfere with any District of Columbia policy, but failure to apply the foreign law would frustrate the policy of the foreign state. The court applied a New York regulation to determine an issue raised by an accident which happened in the District of Columbia.

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14. Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944).

15. *Id.*

16. *See* Tramontana v. Varig Airlines, 383 U.S. 943 (1966); Roscoe v. Roscoe, 379 F.2d 94 (D.C. Cir. 1967); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965).

17. 357 F.2d 581 (D.C. Cir. 1965).

18. *Id.* at 586.

It seems that in the face of the *Myers* dissent, which extolled the practical virtue of lex loci delicti,[19] it would have been more judicious to employ the *Williams* rather than the *Babcock* method, since the immediate results would have been the same in either case. In the final analysis both seem to be based on an inspection of the policies behind the tort laws and the relation of the policies to the issue presented.

If the court had followed *Williams*, however, it would only have created another exception to the lex loci rule. In adopting the grouping of contacts approach the court has weakened the basic lex loci concept. Also, it has diminished the likelihood that subsequent courts will automatically apply the lex loci rule in the District of Columbia. Choice of law based on the policies underlying the tort laws which conflict is much more likely because the court chose the grouping of contacts approach.

The South Caroline Supreme Court has declined to abandon the established lex loci delicti rule,[20] at least until a better rule has been developed and established. *Myers* does not change the process established in *Babcock* in any way which would make it more acceptable to South Carolina, but it does put the weight of another jurisdiction behind the grouping of contacts approach and supplies another crucible for its case by case development.

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19. Myers v. Gaither, 232 A.2d 577, 585-86 (D.C. Cir. 1967).
20. Osheik v. Osheik, 244 S.C. 249, 255, 136 S.E.2d 303, 306 (1964).

CRIMINAL PROCEDURE—Prohibition Against the Imposition of a Harsher Sentence on Retrail—A greater sentence cannot be imposed after a new trial is granted because of a constitutional error in the original trial. *Patton v. North Carolina* (4th Cir. 1967).

The defendant pleaded nolo contendere in October, 1960, to a charge of armed robbery and was sentenced to twenty years in prison. In April, 1964, the defendant moved for a post-conviction hearing on the basis of *Gideon v. Wainwright*[1] and was awarded a new trial. With assistance of counsel the defendant pleaded not guilty at the subsequent trial, but was convicted under the original indictment and sentenced to twenty years in prison on February 17, 1967.

Having been incarcerated since June 10, 1960, the defendant applied to the district court for a writ of habeas corpus, contending that the subsequent twenty year sentence in addition to the previous period of confinement, constituted a harsher sentence than that imposed at the original trial. He further contended that the subsequent sentence should be vacated. His argument was that a harsher sentence following a second conviction for the same offense represented a denial of due process, was inconsistent with the prohibition against double jeopardy, and was a denial of equal protection of the law. The district court reversed, ruling that the harsher sentence violated due process and equal protection standards. The Fourth Circuit Court of Appeals, *held*, affirmed. The harsher sentence upon retrial violated the constitutional guarantees of due process, equal protection, and the prohibition against double jeopardy. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967).

Courts have generally upheld the imposition of a greater sentence upon an individual when he has been granted a new trial. In sustaining heavier sentences, the courts have relied on three theories to counter constitutional objections: First, the petitioner was deemed to have "waived" the right to rely on the findings and adjudications of the original trial;[2] Second, the original trial was to be considered as "void"—having never ex-

1. 372 U.S. 335 (1963).

2. *See, e.g.*, Brewster v. Swope, 180 F.2d 984 (9th Cir. 1950); Robinson v. United States, 144 F.2d 392 (6th Cir. 1944); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964).

isted;[3] Third, the petitioner had subjected himself to "continuing jeopardy."[4] The *Patton* decision rejected these arguments.

Under the due process clause of the fourteenth amendment, the basic argument of the court can be stated as follows: "The subjection of the defendant to the risk of a harsher penalty upon retrial and conviction for the same offense, as a condition of receiving a fundamentally fair trial, is an unconstitutional condition on his right to a fair trial."[5]

Previously, the due process argument had been rejected if the new sentence together with the original confinement did not exceed the specified statutory maximum for the committed offense.[6] The *Patton* decision vitiated this reasoning by stating that "[i]t is *grossly unfair* for society to take five years of a man's life and then say, we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen."[7]

This "fundamental fairness" argument has been used extensively in incorporating particular sections of the Bill of Rights into the fourteenth amendment and applying these sections to state criminal proceedings.[8] In *Patton* the court used this "fundamental fairness" test in concluding that a harsher sentence upon retrial violated due process of law.

Patton determined that it was a violation of due process to grant an indivdual a constitutional right to a new trial and

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3. *E.g.*, Hobbs v. Maryland, 231 Md. 533, 191 A.2d 238 (1963), *cert. denied*, 375 U.S. 914 (1963).

4. Kohlfuss v. Warden, Conn. State Prison, 149 Conn. 692, 183 A.2d 626 (1962), *cert. denied*, 371 U.S. 928 (1962); Kepner v. United States, 195 U.S. 100 (1904) (Holmes, J., in his dissent stated that a second trial based on the original case is only a continuation of that case).

5. Van Alstyne, *In Gideon's Wake: Harsh Penalties and the Successful Criminal Appellant*, 74 YALE L.J. 606, 613 (1965); *see* Fay v. Noia, 372 U.S. 391 (1963); Green v. United States, 355 U.S. 184 (1957).

6. *E.g.*, Hobbs v. Maryland, 231 Md. 533, 191 A.2d 238 (1963), *cert. denied*, 375 U.S. 914 (1963).

7. Patton v. North Carolina, 381 F.2d 636, 639 (4th Cir. 1967) (emphasis added); *see*, United States v. Walker, 346 F.2d 428 (4th Cir. 1965).

8. *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213 (1967) (incorporation of sixth amendment's right to speedy trial); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporation of fifth amendment's prohibition against self-incrimination); Wolf v. Colorado, 338 U.S. 25 (1949) (incorporation of fourth amendment); *Contra*, Palko v. Connecticut, 320 U.S. 319 (1937) (double jeopardy clause of sixth amendment was not incorporated into the due process clause of the fourteenth amendment).

then restrict his enjoyment of this right by threatening him with a harsher sentence should he be reconvicted.

The court next turned its attention to the fourteenth amendment and considered the defendant's equal protection argument. This was perhaps the weakest argument presented for reversal.

The *Patton* decision articulated the proposition that the North Carolina procedure permitting courts to review a sentence on successful appeal, is arbitarily discriminatory and must fail upon the application of the equal protection clause. The court based its conclusion on the rationale that if all convicted persons are considered as a class, then those who choose to exercise the right of appeal are subjected to the possibility of receiving a greater sentence. Those who choose to remain in prison are not subjected to an increase in sentence. The court derived its equal protection argument from a comparison of these two classes of convicted persons stating that:

> North Carolina strictly forbids an increase in a defendant's sentence after the trial court's term has expired and service of sentence has commenced. Thus the threat of a heavier sentence falls solely on those who utilize the post-conviction procedures provided by the state. . . . This is an arbitrary classification offensive to the equal protection clause.[9]

The traditional equal protection standard was discussed in *Griffin v. Illinois*.[10] The *Griffin* Court held that a defendant was denied equal protection when he was refused a trial transcript on appeal because of his indigency. The decision stated that a class was established among those defendants who exercised an appeal. This class could be further divided into two subclasses. One of the subclasses was composed of those denied trial transcripts on appeal because of their inability to purchase them. The other subclass consisted of those able to purchase transcripts. Consequently, those who could afford a transcript maintained an advantage in their appeals, and therein lay the equal protection violation.

In *Patton*, no such classification can be made within that class which seeks to appeal. *All* are subject to a potentially heavier sentence and *all* stand on equal footing in their separate appeals.

9. Patton v. North Carolina, 381 F.2d 636, 642 (4th Cir. 1967).
10. 351 U.S. 12 (1956); *accord,* Douglas v. California, 372 U.S. 353 (1963).

In essence, the *Griffin* decision pointed out arbitrary class discrimination within a class. These elements usually make up the standard on which a violation of equal protection is based,[11] but in comparing *Patton* with *Griffin*, no arbitrary discrimination is found within the class of appellants in the *Patton* situation.

The court next considered the double jeopardy contention; however, it was not clear from the opinion to what extent the court rested its decision on this consideration.[12]

The constitutional guarantee against double jeopardy has been traditionally invoked to prohibit "multiple prosecutions" in federal procedures.[13] However, the double jeopardy clause has yet to be incorporated into the due process clause of the fourteenth amendment.[14] Therefore, the constitutional guarantee against double jeopardy does not preclude an appeal by the states when the appeal is based on prejudicial error in the original trial or when a defendant appeals a state conviction and is granted a new trial.[15]

Some inroads have been made into the proposition that states are free to reprosecute without violating double jeopardy. *Bartkus v. Illinois* [16] acknowledged some double jeopardy content in the fourteenth amendment, although the court did not specifically indicate where the line should be drawn.

The *Patton* decision was not concerned with multiple prosecutions, but it enforced the double jeopardy clause against the

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11. *See generally* Douglas v. California, 372 U.S. 353 (1963); Baker v. Carr, 369 U.S. 186 (1962); Griffin v. Illinois, 351 U.S. 12 (1956).

12. 381 F.2d 636 (4th Cir. 1967). The court initiates its argument on double jeopardy by saying that "[i]n view of the foregoing [equal protection and due process], we need not rest our decision on double jeopardy grounds." *Id.* at 643. But at the end of the opinion, the court says: "To summarize, we conclude that increasing Patton's punishment . . . placed him twice in jeopardy of punishment for the same offense." *Id.* at 646.

13. Downum v. United States, 372 U.S. 734 (1963); United States v. Ball, 163 U.S. 662 (1896).

14. *See* Palko v. Connecticut, 302 U.S. 319 (1937). This decision established the precedent that the fifth amendment's prohibition against placing an accused in double jeopardy would not be applicable to state court prosecutions under the fourteenth amendment's due process clause. *See, e.g.*, Cichos v. Indiana, 385 U.S. 76 (1966). In this case the Court decided that the defendant's contention that he had been placed in double jeopardy was invalid. The Court stated that it was unnecessary to consider whether the double jeopardy prohibition would be applied to the states by the fourteenth amendment.

15. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

16. 359 U.S. 121 (1959); *see* United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965); "[a]t least the basic core of that double jeopardy guarantee can be ranked as fundamental." *Id.* at 853.

states when a harsher sentence was imposed at a new trial granted in reliance upon a constitutional post-conviction remedy. The court premised its argument on a restriction against "multiple punishment." It decided that since double jeopardy precluded an increased sentence once the defendant had begun serving his time,[17] the defendant could not be sentenced to a longer term at his new trial, unless he had waived his rights of protection against multiple punishment. Since involuntary waiver offends due process, it cannot be said that he had waived this guarantee; therefore, the protection against multiple punishment continued through sentencing in the subsequent trial.[18] The court also based its conclusion in part on *Green v. United States*[19] in which it was held that a defendant may not be subjected to a more stringent penalty in a new trial when he had been previously convicted of the same offense and had been given a milder sentence. The *Green* decision was based on the theory of "implied acquittal." The Court determined that once the defendant had been convicted of second degree murder, he was impliedly acquitted of first degree murder in his new trial.

At least one state court has reached the same conclusion as the *Patton* court. In *People v. Henderson*[20] the Supreme Court of California held that to impose a heavier sentence at a new trial violates the due process and the double jeopardy clauses of California's Constitution.

More importantly, a conflict has arisen among circuit courts. A First Circuit case, *Marano v. United States*[21] reached the same result as the *Patton* decision, but in *Starner v. Russell*,[22] the Third Circuit reached the opposite result.

This conflict of the circuits will hopefully bring this question before the Supreme Court for final adjudication. Since the basic argument seems to involve the protection of an individual's constitutional right to a fair trial when a new trial is granted, and in view of the Supreme Court's recent decisions protecting the criminally accused, it appears that the *Patton* decision conforms with today's trends.

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17. *See, e.g.*, United States v. Benz, 282 U.S. 304 (1931); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966).
18. Walsh v. United States, 374 F.2d 421 (9th Cir. 1967); Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967); United States v. Walker, 346 F.2d 428 (4th Cir. 1965).
19. 355 U.S. 184 (1957).
20. 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 71 (1963).
21. 374 F.2d 583 (1st Cir. 1967).
22. 378 F.2d 808 (3d Cir. 1967).

CRIMINAL PROCEDURE—Sixth Amendment Right to Compulsory Process—The right of a defendant to have compulsory process for obtaining witnesses in his favor is a fundamental right applicable to the states through the fourteenth amendment. *Washington v. Texas* (Sup. Ct. 1967).

Petitioner was convicted of murder with malice and sentenced to fifty years in prison. Testifying on his own behalf, petitioner claimed that his coparticipant fired the fatal shotgun blast and offered the testimony of his coparticipant to substantiate this version of the facts.[1] On the basis of two Texas statutes providing that persons charged or convicted as coparticipants in the same crime as either principals, accomplices or accessories could not testify for one another,[2] the trial judge refused to allow the coparticipant to testify and petitioner was convicted. The Texas Court of Criminal Appeals refused to sustain appellant's objection that he had been denied his constitutional right of compulsory process, and held that the legislature has the power, except as limited by the state constitution, to prescribe the competency of witnesses in all cases.[3] On appeal to the United States Supreme Court, *held*, reversed. The right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the sixth amendment, was so

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1. Fuller v. State, 397 S.W.2d 434 (Tex. Crim. App. 1966).

2. "Persons charged as principals, accomplices or accessories, whether in the same or by different indictments, cannot be introduced as witnesses for one another, but they may claim a severance, and if one or more be acquitted they may testify in behalf of the others." TEX. PEN. CODE ANN. art. 82 (1925) (repealed 1967).

> Persons charged as principals, accomplices or accessories, whether in the same or different indictments cannot be introduced as witnesses for one another, but they may claim a severance; and, if one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others.

TEX. CODE CRIM. PROC. ANN. art. 711 (1925).

Art. 711 was apparently repealed by implication by art. 36.09 of the TEX CODE CRIM. PROC. ANN. (1965) which became effective after petitioner's trial. Art. 36.09 provides that:

> Two or more defendants who are jointly and separately indicted or complained against for the same offense or an offense growing out of the same transaction may be, in the discretion of the court, tried jointly or separately as to one or more defendants; provided that in any event either defendant may testify for the other or on behalf of the State. . . .

However, Brown v. State, 401 S.W.2d 251 (Tex. Crim. App. 1966) held, citing Washington v. State, 400 S.W.2d 756 (Tex. Crim. App. 1966) as authority, that the statutory provisions providing that parties charged as principals cannot be introduced as witnesses for one another were valid and not impliedly repealed.

3. Washington v. State, 400 S.W.2d 756 (Tex. Crim. App. 1966).

fundamental and essential to a fair trial that it was incorporated in the due process clause of the fourteenth amendment. *Washington v. Texas*, 87 S.Ct. 1920 (1967).

At common law an accused did not have the right to compulsory process of obtaining witnesses in his favor. The history of the law securing for accused persons the right to compulsory process for their witnesses shows that the purpose of statutes was merely to cure the defect of the common law by giving to defendants in criminal cases the common right which was already possessed both by parties in civil cases and by the prosecution in criminal cases.[4] Jealously guarding their right to maintain wide latitude in criminal procedure,[5] the majority of states enacted constitutional provisions which agreed with the compulsory process guarantee of the sixth amendment,[6] and gradually relaxed limitations on an accused's right to secure witnesses in his favor.[7] Most state constitutions provided nothing new or exceptional, but gave solid sanction in the special case of accused persons to the procedure recognized and practiced for witnesses in general. However, some states retained certain qualifications as to the right of an accused to secure compulsory process.[8]

The federal courts refused to abandon the harsh common law restrictions, despite Court cognizance in *United States v. Reid*[9] that the sixth amendment was predicated on the desire to remove the harsh and odious rules that prevented a defendant from securing witnesses in his defense in a criminal proceeding. The Court, however, expressly overruled *Reid* in *Rosen v. United States*,[10] but rested its decision on nonconstitutional grounds.[11]

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4. 8 J. WIGMORE, EVIDENCE § 2191 (McNaughton rev. ed. 1961).

5. *See* Cicenia v. LaGay, 357 U.S. 504 (1958); Hoag v. New Jersey, 356 U.S. 464 (1958); United States *ex rel.* Thompson v. Price, 258 F.2d 918 (3d Cir. 1958).

6. *E.g.*, S.C. CODE ANN. § 17-506 (1962), which implements S.C. CONST. art. I, § 18 (1895).

7. *See, e.g.*, State *ex rel.* Gladden v. Lonergan, 201 Ore. 163, 269 P.2d 491 (1954); State v. Kennedy, 85 S.C. 146, 67 S.E. 152 (1910); McCaleb v. State, 401 S.W.2d 611 (Tex. Crim. App. 1966). *But see* State v. Pope, 78 S.C. 264, 58 S.E. 815 (1907).

8. *See* 8 J. WIGMORE, EVIDENCE § 2191 (McNaughton rev. ed. 1961).

9. 53 U.S. (12 How.) 361 (1852).

10. 245 U.S. 467 (1918).

11. *Id.* The Court concluded that the "dead hand of the common law rule" of the Judiciary Act of 1789, by which the competency of witnesses in criminal trials in United States' courts was determined by the rules of evidence which were in force in the respective states when the act was passed should no longer be applied.

In *United States v. Seeger*[12] the district court stated that under the sixth amendment a defendant in a federal trial has the right to compel attendance of witnesses, and may not be deprived of that right when it is believed that the witnesses may offer proof to negate the Government's evidence or support the defense. The court asserted that denial of the right as secured by the sixth amendment would also be a denial of the right to fair trial under the due process clause of the fifth amendment.

The right to secure compulsory process deemed so fundamental and essential to a fair trial by federal standards, certainly should be afforded in a state proceeding to protect an accused from state abridgment of those rights recognized as fundamental elements of due process under the fourteenth amendment. In *Pointer v. Texas*[13] the Court stated that the guarantee of the right of an accused to be confronted with witnesses is to be enforced against the states under the fourteenth amendment according to the same standards that protect those personal rights against federal encroachment. The Court, in *Gideon v. Wainwright*,[14] which made the right to counsel obligatory upon the states through the application of the fourteenth amendment, stated that "those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment."[15]

In deciding whether compulsory process is a fundamental right as secured by the sixth amendment guarantee, it is less than surprising that the Court adhered to those mandates which accorded an accused the right to have assistance of counsel for his defense, to be confronted with witnesses against himself, and to have the right to a speedy[16] and public trial.[17] The opportunity to be heard in defense is a right basic to our system of jurisprudence,[18] and the rights to offer the testimony of witnesses and to compel their appearance before the court are essential to the establishment of a defense. These rights, necessitated by the demands of due process, were thus placed on no

12. 180 F. Supp. 467 (S.D.N.Y. 1960).
13. 380 U.S. 400 (1965).
14. 372 U.S. 335 (1963).
15. *Id.* at 341.
16. Klopfer v. North Carolina, 386 U.S. 213 (1967).
17. *In re* Oliver, 333 U.S. 257 (1948).
18. *Id.*

lesser footing than previously accorded sixth amendment guarantees made applicable to the states by the due process clause of the fourteenth amendment.[19]

It is a principle well established in law that courts have the power to procure attendance of witnesses, including convicted felons.[20] Upon court determination that attendance of a witness is necessary in a proper hearing it is within the court's power to compel attendance of a witness confined in jail or a state prison.[21] In *Washington* the Texas court did not refuse to compel the coparticipant's attendance, but denied the right of compulsory process in favor of the accused because a state statute arbitrarily made his testimony inadmissible. The Court stated that the rule could not be defended on the ground that it sets apart persons most likely to commit perjury.[22] The Court established the right of compulsory process as a fundamental element of due process protected from arbitrary state abridgment by the fourteenth amendment.

The *Washington* decision, while marking total incorporation of the sixth amendment into the fourteenth amendment, portends no radical changes in criminal procedure in a majority of the states. Henceforth, the states may not arbitrarily deny compulsory process in a criminal proceeding by fettering an accused with statutory provisions designed to delimit the effectiveness of federal and state constitutional provisions.

JAMES G. BOYD

19. Washington v. Texas, 87 S.Ct. 1920, 1923 (1967).

20. *Compare* State v. Bagges, 350 Mo. 984, 169 S.W.2d 407 (1943) *and* Lee v. State, 70 S.W.2d 190 (Tex. Crim., App. 1934) *with* Magee v. State, 187 So. 2d 274 (Ala. 1966) *and* State *ex rel.* Gladden v. Lonegran, 201 Ore. 163, 269 P.2d 491 (1954).

21. 97 C.J.S. *Witnesses* § 14(b) (1957).

22. Washington v. Texas, 87 S.Ct. 1920, 1925 (1967).

EVIDENCE—Wrongful Death of a Minor—Evidence of a decedent minor's moral delinquencies is inadmissible to mitigate damages in a suit for loss of society, and for the sorrow, suffering, and mental anguish of the family. *Gamble v. Hill* (Va. 1967).

Plaintiff, as administrator, brought an action for wrongful death of his sixteen year old daughter who was killed in a collision between an automobile and a bus. The automobile in which she was a passenger was driven by the decedent Haley, and the bus was owned by the Virginia Transit Company. In his suit against both drivers and the bus company, plaintiff sought damages for loss of society, and for the sorrow, suffering, and mental anguish of the parents and other members of the decendent's family. In an attempt to mitigate damages, defendants requested that they be allowed to develop evidence demonstrating certain of the decedent's moral delinquencies: namely, that at the age of sixteen she was the mother of a three year old illegitimate child; and that she was unmarried and pregnant at the time of her death. The trial court held this evidence inadmissible, and ultimately a twenty thousand dollar verdict was returned against all defendants.

The defendants appealed, but only Haley's administratix attacked the lower court's ruling on the inadmissibility of the evidence. The Supreme Court of Appeals of Virginia, *held*, affirmed in part, reversed in part.[1] The evidence tendered by the defendants was not relevant to the issue of damages, and thus was properly excluded. *Gamble v. Hill*, 156 S.E.2d 888 (Va. 1967).

The leading authorities recognize that evidence of a person's character may be relevant and thus admissible in three situations: First, when character is an issue or operative fact for determining rights and liabilities; second, when character is used as an evidentiary fact to prove conduct and state of mind by circumstantial evidence; third, when character is used to impeach the credibility of a witness.[2] Clearly, the last two

1. On appeal judgment was reversed against the defendant bus driver Gamble and the Virginia Transit Company for reasons not relevant to the present discussion. The Supreme Court of Appeals of Virginia held that the evidence was insufficient to support finding that the driver of the bus was guilty of any negligence which was a proximate cause of the collision and the death of the plaintiff's intestate.

2. 1 J. WIGMORE, EVIDENCE §§ 52-81 (3d ed., 1940); C. MCCORMICK, EVIDENCE §§ 153-62 (3d ed. 1954).

criteria have no application in the present controversy. In regard to the first situation, *Gamble* considers whether character evidence is admissible to mitigate damages in a wrongful death action.

Evidence of a deceased's character is frequently admissible when direct pecuniary loss to a beneficiary is in issue.[3] In addition, when members of a decedent's family testify as to his character and relationship with the family, the defendant on cross examination may demonstrate the decedent's bad habits and unhappy family relationship.[4] Bad character and habits are recognized as material in estimating the amount that an individual can anticipate earning during a normal life expectancy, and thus are relevant to show the extent of a beneficiary's loss of support.[5] In *Gamble*, a case of first impression, the Virginia court was presented the question of whether to admit evidence of moral character in a case in which plaintiff has offered no evidence of decedent's character and seeks to recover for loss of society, sorrow, suffering and mental anguish to the family rather than for pecuniary loss.

There is conflict of authority in other jurisdictions as to whether evidence of moral character of juveniles should be admitted at trial on the issue of damages. Indeed, cases from other states "throw little light on just why such evidence should be admitted or excluded."[6] Of the five cases cited in the *Gamble* opinion,[7] none dealt with the kind of damages sought in the present action; moreover, four of these five cases concerned attempts to introduce evidence of juvenile misbehavior or penal commitment. Perhaps these cases should have been limited to their factual situations.

Both *Anthony v. New York Central Railroad*[8] and *Hill v. Erie Railroad*[9] excluded records of juvenile delinquency pro-

3. 1 J. WIGMORE, EVIDENCE § 210 *a* (3d ed. 1940). *See, e.g.*, Wimberly v. City of Paterson, 75 N.J. Super. 584, 183 A.2d 691, (1962); Hill v. Erie R.R. 225 App. Div. 19, 232 N.Y.S. 66 (1928); Norfolk & W. Ry. v. Lumpkins, 151 Va. 173, 144 S.E. 485 (1928); Fleming v. City of Seattle, 45 Wash. 2d 477, 275 P.2d 904 (1954).

4. Basham v. Terry, 199 Va. 817, 102 S.E.2d 285 (1958).

5. 1 J. WIGMORE, EVIDENCE § 210 *a* (3d ed. 1940).

6. Gamble v. Hill, 156 S.E.2d 888, 893 (Va. 1967).

7. Anthony v. New York Central R.R., 61 Ill. App. 2d 466, 209 N.E.2d 686 (1965); Smith v. King, 239 S.W.2d 955 (Ky. 1951); Wimberley v. City of Paterson, 75 N.J. Super. 584, 183 A.2d 691 (1962); Russell v. Cirillo, 17 App. Div. 2d 1005, 234 N.Y.S.2d 67 (1962); Hill v. Erie R.R., 225 App. Div. 19, 232 N.Y.S. 66 (1928).

8. 61 Ill. App. 2d 466, 209 N.E.2d 686 (1965).

9. 225 App. Div. 19, 232 N.Y.S. 66 (1928).

ceedings. The exclusion in the former opinion was based on the grounds that the misbehavior was too remote since it occurred four years prior to death. If this alone were to be the criterion, the evidence in the present case would certainly not be too remote in time. In *Hill* the prior proceeding was found inadmissible because the adjudications did not have sufficient probative force to constitute legal evidence. The court stated that it did not "mean to intimate that it is not open to the defendant in such a case as this to show the habits and character of the child."[10] In each of these cases the respective courts determined that the language of their juvenile statutes intended to exclude such evidence so as not to penalize a child in any way.

Russell v. Cirillo[11] in effect reversed *Hill* by allowing introduction of evidence of two juvenile commitments in an action for wrongful death since the identical information appeared on the school records of the deceased. Likewise, the Appellate Division of the New Jersey Superior Court admitted evidence demonstrating that the decedent had been committed to a boys' home because this might reflect on his future earning capacity.[12] This decision recognized that particular "bad acts" on the deceased's part could be introduced to aid in determining damages, although the court furnishes no insight into what these acts might encompass.

If parents in a wrongful death action seek damages for loss of society or companionship, such a suit is a variant of the husband's action for loss of consortium when his wife is injured or killed.[13] As early as 1890, the Virginia Court in *Simmons v. McConnell*[14] recognized the analogy between these two types of

10. *Id.* 232 N.Y.S. at 69.

11. 17 App. Div. 2d 1005, 234 N.Y.S.2d 67 (1962).

12. Wimberley v. City of Paterson, 75 N.J. Super. 584, 183 A.2d 691 (1962).

13. Note, *Damages for the Death of a Minor Child,* 15 DEFENSE L. J. 278 (1966).

14. 86 Va. 494, 10 S.E. 838, 839 (1890). The court, in recognizing that all the surrounding circumstances and situations in regard to the family ought to be considered, stated that:

> [T]he "solace and comfort" afforded to his mother, and her "sorrow, suffering, and mental anguish" occasioned by his death might all properly be considered . . . in estimating . . . damages.

Then the court continued:

> If the character and conduct of the wife be such that her death will cause but little "sorrow, suffering, and mental anguish" to the husband, then the fair and just proportion of the damages ought to be awarded.

damages. *Gamble*, however, makes no reference to loss of consortium.

An early Massachusetts case,[15] in an opinion by Justice Holmes, upheld the admission of evidence of moral character to mitigate damages in a loss of companionship suit brought for the wife's injury. The evidence demonstrated that the husband did not avail himself of the companionship and society of the wife. More recent decisions have also allowed introduction of evidence to show the lack of love and affection existing among the husband, wife and their family.[16]

The rationale advanced for allowing mitigation of damages in consortium cases is that a realistic appraisal of damages is likely to occur. When all evidence is weighed by the jury, hopefully only the actual loss will be compensated.[17] Moreover, at least one jurisdiction has recognized that in suits for wrongful death of children, the degree of intimacy between the child and its parents may be considered, so that only actual damages will be compensated.[18] At the heart of the present case is the question of whether this evidence would balance the monetary scales instead of tipping them prejudicially toward the defendant.

None of the authority above offered a controlling precedent for the task facing the Virginia court. Consequently, the court had to rely upon policy considerations rather than judicial authority. Two reasons were advanced by the majority for excluding the proffered evidence.

The first reason suggested was that this evidence was not relevant to the element of damages because it did not demonstrate that the intestate's immoral acts resulted in her parents and family having less affection for her. Since the parents allowed their daughter to remain at home, the majority felt it appropriate to look to the parable of the Prodigal Son to support the proposition that "despite such moral delinquencies

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15. Sullivan v. Lowell & D. St. Ry., 162 Mass. 536, 39 N.E. 185 (1895). This case is discussed in Note, *Mitigation of Damages for Loss of Consortium*, 28 U. PITT. L. REV. 366, 367 n.7 (1966).

16. *E.g.*, Craig v. Boston & Me. R.R., 92 N.H. 408, 32 A.2d 316 (1943); Capital Airlines v. Barger, 47 Tenn. App. 636, 341 S.W.2d 579 (1960); Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955).

17. *See* Note, *Mitigation of Damages for Loss of Consortium*, 28 U. PITT. L. REV. 366, 369-70 (1966).

18. Anderson v. Great N. Ry., 15 Idaho 513, 99 P. 91 (1908), *reaff'd* in Gardner v. Hobbs, 69 Idaho 288, 206 P.2d 539 (1948).

the parents of a wayward child *may* have deep affection for it."[19]

In a vigorous dissent Justice Carrico emphasized the word "may" in the language used by the majority. He readily admitted that the parents may love this child as much, but questioned whether they *did* in fact have as deep affection for her. The jury, as the trier of fact, should determine the true relationship between the family and this child. Failure to allow the evidence establishes as a matter of law that a girl of immoral character affords the same society to her family as does a child of good character.

The second reason offered by the majority was that the evidence would be prejudicial, and thus possibly confuse the jury who might substitute the issue of moral delinquencies of the child for the true issue of compensation for the parents. Apparently there was fear that members of the jury might substitute their own moral standard for that of the parents in determining the amount of damages.

To counter this, the dissent relied on the prejudicial effect that resulted from barring the evidence. The plaintiff was entitled to the presumtion that the child was innocent of any wrongdoing. Against this presumption, the defense should have been entitled to introduce character evidence to rebut it. The prejudicial effect was exemplified when the plaintiff's counsel in his closing statement referred to this young girl in the following terms:

> I . . . suggest to you respectfully, that [when I think of] a sixteen year old girl . . . I think of the American expression 'sweet sixteen.' I am not suggesting, I am just saying that [this] is an epitome of youth, sweet sixteen.[20]

The majority acknowledged that this summation was prejudicial, but not reversible, since no objection was made in the trial. Under the dissenter's view the original error was in excluding the character evidence because it permitted the plaintiff's counsel to refer to this child as "sweet sixteen"—indeed, the presumption was that she was "sweet sixteen."

Although there was no direct proof presented, the jury was allowed to infer that the death of this young girl may have

19. Gamble v. Hill, 156 S.E.2d 888, 894 (Va. 1967) (emphasis added).
20. *Id.* at 896.

brought sorrow, suffering, and mental anguish, as well as loss of society to her parents. Family relationship alone was sufficient to permit recovery. The defendant's evidence attempted to demonstrate that the damages might not have been as great as presumed. This evidence was relevant for determining the exact loss to the family.

Gamble may be of significance in our own jurisdiction in that South Carolina allows substantially the same type of damages for wrongful death as Virginia[21] and apparently has never passed on this precise issue. If the South Carolina courts confront this question, they should realize that while such evidence itself may not show that there is any lack of affection between the child and her family, to exclude the evidence may well circumvent the concept of compensating only the plaintiff's actual loss.

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21. *E.g.*, Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Johnson v. Charleston & W. C. Ry., 234 S.C. 448, 108 S.E.2d 777 (1959); Nelson v. Charleston & W. C. Ry., 231 S.C. 351, 98 S.E.2d 79 (1957); Gomillion v. Forsythe, 218 S.C. 211, 62 S.E.2d 297 (1950); Mishoe v. Atlantic Coast Line R.R., 186 S.C. 402, 197 S.E. 97 (1938).

TORTS — Contributory Negligence — Illinois judicially abandoned the doctrine of contributory negligence as contrary to justice and public policy and adopted the concept of comparative negligence. *Maki v. Frelk* (Ill. App. 1967).

Plaintiff's decedent was killed in an automobile collision. As administratrix of decedent's estate, plaintiff filed a complaint basing the cause of action on Illinois' Wrongful Death Act.[1] The complaint did not allege the ordinary care which was necessary to oversome the defense of contributory negligence. Instead, the plaintiff alleged that if there were any negligence on her decedent's behalf, it was *less* than that of the defendant when the acts of the two parties were *compared.* Following settled Illinois law,[2] the circuit court upheld defendant's motion to dismiss the allegation for failure to state a cause of action. Plaintiff appealed directly to the Illinois Supreme Court on the theory that the Illinois rule of contributory negligence was an unconstitutional violation of due process under the United States Constitution and that of Illinois. The Illinois Supreme Court held that no constitutional question of a nature necessary to give it jurisdiction on direct appeal was raised. However, on its own motion the court transferred the case to the appellate court for the second district to "[consider] the question of whether, as a matter of justice and public policy, the [contributory negligence] rule should be changed."[3] The appellate court, *held*, reversed and remanded. Present day conditions require, as a matter of justice and public policy, that the contributory negligence rule be abandoned and one of comparative negligence be adopted. *Maki v. Frelk*, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).

Just as Illinois used public policy to strike down contributory negligence, it generally has been felt that policy considerations aimed at controlling tort liability of "emerging" industries

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1. ILL. ANN. STAT. ch. 70, § 1 (1959); *Id.* § 2 (Supp. 1967); *see also* S.C. CODE ANN. § 10-1951 (1962).

2. Illinois adopted the doctrine of contributory negligence in Aurora Branch R.R. v. Grimes, 13 Ill. 585 (1852), abandoned it in Galena & Chicago Union R.R. v. Jacobs, 20 Ill. 478 (1858) in favor of a common law form of comparative negligence which compared degrees of negligence to established liability (the "ordinary-gross" distinction) but did not apportion damages. However, Illinois returned to the original doctrine in Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N.E. 456 (1885) and had adhered to the doctrine until the present case.

3. Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284, 285 (1967).

during the Industrial Revolution provided the impetus necessary to entrench the doctrine firmly in negligence law.[4]

The doctrine originated in England in 1809 in the case of *Butterfield v. Forrester*,[5] in which the plaintiff left a public house at dusk and rode his horse "violently" into a pole projecting across part of the highway, thereby injuring himself. The pole had been negligently placed across the road by the defendant who was using it in house repairs. The court held that, "One person being in fault will not dispense with another's using ordinary care for himself."[6] The reasoning of the case was followed in England, and the doctrine was first adopted in the United States in 1824.[7] Contributory negligence was recognized in Illinois in 1852,[8] in South Carolina as early as 1851,[9] and is today a part of the tort law in the majority of jurisdictions in this country.

The logic of the doctrine is easy to see, but allowing the defense as a complete bar to any recovery by the plaintiff clearly could and did give harsh results. While the development of such doctrines as "last clear chance"[10] tended to abrogate this harshness, the result was to completely swing the pendulum back to the plaintiff allowing him full recovery. A more permanent modification of the defense was the distinction between "casual" or "ordinary" and "willful and wanton" negligence.[11] However, the result of total recovery or total loss remained under this distinction. Since there is often some degree of negligence on both sides in an accident case, comparative negligence and apportionment of damages has long been popular with most authorities on the subject of torts.[12] Those favoring retention of the contributory negligence doctrine feel that the actual results are not as

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4. *See* Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967); W. PROSSER, THE LAW OF TORTS § 64 at 428 (3d ed. 1964); Eldredge, *Contributory Negligence: An Outmoded Defense That Should Be Abolished*, 43 A.B.A.J. 52 (1957).

5. 103 Eng. Rep. 926 (1809).

6. *Id.* at 927.

7. Smith v. Smith, 2 Pick. 621 (Mass. 1824).

8. Aurora Branch R.R. v. Grimes, 13 Ill. 585 (1852).

9. *See, e.g.*, Freer v. Cameron, 4 Rich. L. 228 (S.C. 1851).

10. Davies v. Mann, 152 Eng. Rep. 588 (1842).

11. C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS, 226 (1959).

12. *See, e.g.*, Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).

severe as the majority would have us believe, and at least one writer feels the doctrine is necessary as a check on the American jury.[13]

The *Maki* court considered several of the "typical" arguments in favor of retaining the doctrine. The arguments discussed were that any harshness of contributory negligence would be overcome by compromised jury verdicts,[14] and that comparative negligence would not encourage settlements; therefore, court congestion and insurance rates would be increased.[15] The court viewed these arguments as based on administrative and procedural considerations insufficient to justify the substantive wrongs which have often arisen under the contributory negligence doctrine. The Workmen's Compensation Act[16] and the Federal Employee's Liability Act[17] were cited as examples of local and national statutory abrogation of the old rule in the "industrial" tort area. The court saw a modern day "transportation revolution" as requiring the same flexibility in all other tort areas and proceeded to adopt the so-called "modified" formula[18] of comparative negligence and apportionment of damages.

While several states have adopted comparative negligence statutes, the possibility that such a step would ever be taken by a court had been seriously questioned by most authorities.[19] This fact was pressed on the court by defendant's argument that such a decision was for the legislature, not the court. The logic of the court's reasoning and the simplicity of its reply could provide great persuasion on other jurisdictions if faced with

13. Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005 (1957).

14. *Id.*

15. *See* Gilmore, *Comparative Negligence From a Viewpoint of Casualty Insurance*, 10 ARK. L. REV. 82 (1955).

16. ILL. ANN. STAT. ch. 48, §§ 138-72 (1950), *as amended* (Supp. 1967); *see also* S. C. CODE ANN. §§ 72-1 to-504 (1962); *as amended* (Supp. 1967).

17. 45 U.S.C. § 51 (1964).

18. The present statutes dealing with comparative negligence fall roughly into two groups. The "pure" form permits the plaintiff to recover regardless of his degree of negligence, while the "modified" form allows recovery only if the plaintiff is less negligent than the defendant. In the former case a plaintiff who is eighty percent negligent could still recover twenty percent of his damages, while under the latter type statute, whenever his negligence reaches fifty percent, he is barred from any recovery.

19. C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS, 224 (1959); *see* W. PROSSER, THE LAW OF TORTS § 66, at 445 (3d ed. 1964); Comment, *Torts—Comparative Negligence—Good or Ill for Missouri*, 30 MO. L. REV. 137 (1965).

a similar argument. The court replied: "The doctrine of contributory negligence was created by the courts, not the legislature. If we have created it, and if it does not meet the needs of present day life, then we are duty bound to abolish it."[20]

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20. Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284, 291 (1967).

TORTS — Municipal Corporations — The proprietary-governmental test is discarded as the method of determining liability for municipal corporations. *B. W. King, Incorporated v. Town of West New York* (N.J. 1967).

The plaintiff brought an action for recovery of damages to its properties resulting from a fire which originated on piers owned by the defendant municipality. The piers were acquired incident to the exercise of the municipality's taxing power. The piers were not employed for a municipal purpose but were rented for barge tie-ups at a nominal daily fee. The appellate division reversed the trial court's judgment notwithstanding the verdict, and reinstated plaintiff's jury verdict. The Supreme Court of New Jersey, *held*, reversed and remanded. Liability would not be based upon a finding that the municipality's function in connection with this property was either proprietary or governmental. However, liability would be based on the premise that a municipality acquiring title to realty incident to the exercise of its taxing power, but not employing or using the acquired property for a public municipal purpose, would have the same duties and liabilities as would private land owners. *B. W. King, Incorporated v. Town of West New York*, 49 N.J. 318, 230 A. 2d 133 (1967).

"The central idea in the law of municipal tort liability is that a municipality is liable for its torts in the exercise of proprietary but not governmental functions."[1] It is generally assumed, as did the Supreme Court recently, that the distinction "is an endeavor . . . to escape from the basic historical doctrine of sovereign immunity."[2] Actually, "before the judicial invention of the distinction, liability was usually imposed upon municipalities without regard to the distinction."[3] The origin of municipal immunity can be traced to an early English decision, *Russell v. Men of Devon*,[4] which was based on the theory that "the king can do no wrong but his ministers may."[5] There was

1. Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 773 (1956).

2. Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).

3. Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 773 (1956); *e.g.*, Hooe v. Alexandria, 12 F. Cas. 461 (No. 6666) (C.C.D.C. 1802); Goodloe v. Cincinnati, 4 Ohio 500 (1831); *see* Barnett, *The Foundations of the Distinction between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937).

4. 100 Eng. Rep. 359 (1788).

5. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).

an early Massachusetts decision[6] adopting this distinction but the leading American case is *Bailey v. City of New York*.[7] By 1939 all but two states had adopted the proprietary-governmental test for determining municipal corporate liability.[8]

Although at present this doctrine generally prevails, it "is undergoing essential modification, and certain judicial decisions and writers have faith in its abolition."[9] The Supreme Court of Florida was the first court to overrule the precedent of basing municipal liability on the proprietary-governmental distinction. The court stated "that the time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be."[10] The court acknowledged the doctrine of stare decisis; however, it felt that the law should not be static but should meet the needs and demands of changing times. The court said that since the modern city is substantially a large business institution, it should not be endowed with sovereign immunity. Other state supreme courts have also abolished the distinction and based their decisions on the need to place the responsibility for wrongs where it should be.[11]

New Jersey has long experienced difficulty in applying this inadequate method of determining municipal liability. By 1934, it had reached a variety of results under the rule.[12] Since then the decisions "have not met the persistent demand for some definitive statement setting principles which will uniformly control in this area."[13] The New Jersey Supreme Court in *Cloyes v. Township of Delaware*[14] said that this test for determining liability would not withstand inquiry. It went on to say, however, that this was not the case "in which to consider

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6. Mower v. Leicester, 9 Mass. 247 (1812).

7. 3 Hill 531 (N.Y. 1842).

8. Hooggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939). South Carolina and Florida were the holdouts.

9. MCQUILLIAN, MUNICIPAL CORPORATION §53.24a, at 179 (3d ed. 1963).

10. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).

11. *E.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Molitor v. Kaneland Community Unit Dist. Number 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911). The South Carolina court rejected the distinction but upheld sovereign immunity for both functions.

12. *See Tort Liability of Municipalities in New Jersey*, 3 MERCER BEASLEY L. REV. 142 (1934).

13. Cloyes v. Township of Delaware, 23 N.J. 324, 327, 129 A.2d 1, 3 (1957).

14. *Id.*

whether to come to grips with the entire problem."[15] In the case at hand the court did come to grips with the problem when it was faced with a municipal function that could be classified as either proprietary or governmental. It recognized the fact that there had been a blind adherence to the proprietary-governmental distinction without a real consideration of the reasons underlying the doctrine. The court took cognizance of the general expansion of municipal activity and agreed with what it felt was a consensus that most of the reasons for immunity have expired and that municipal liability should be subject to less restrictive limits. The court therefore refused to apply the test and held that the municipality should have the same duties and liabilities as private landowners have in similar situations.

By discarding this test for determining municipal liability in New Jersey, the court has raised the problem of developing a substitute rule. As the court pointed out, it is most difficult if not impossible to visualize all the possible sets of circumstances which could give rise to a claimed municipal liability.

Other state supreme courts have shifted the burden of developing a new rule to their legislatures.[16] The South Carolina Supreme Court has said that there would be no municipal liability in the absence of action by the legislature.[17] The Michigan Supreme Court, on the other hand, has said that there would be no municipal immunity in the absence of action by the legislature.[18]

The New Jersey Supreme Court, however, stated that the problem should be approached on a case by case basis, and a new theory of liability should slowly transform. In approaching each case the question asked should not be why immunity should not apply in a given situation but rather one of asking whether there is any reason why it should apply.

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15. *Id.* at 332, 129 A.2d at 5.

16. Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).

17. 89 S.C. 511, 72 S.E. 228 (1911).

18. 364 Mich. 231, 111 N.W.2d 1 (1961).